



October 11, 2011

Fethi Benjemaa
Department of Water Resources
901 P Street, Suite 313A
Sacramento, CA 95814

Sent via email to: jemaa@water.ca.gov

RE: Comments in Response to the Notice of Modifications to the Text of Proposed Regulation on Agricultural Water Measurement dated September 22, 2011

Dear Mr. Benjemaa:

On behalf of the Natural Resources Defense Council, we are writing to provide additional comments on the Department of Water Resources' ("Department") proposed agricultural water measurement regulation, as revised September 22, 2011. Thank you for the extension of time to file these comments.

Unfortunately, as explained in our prior comments¹ and as explained below once again, the current draft regulation conflicts with and fails to meet the statutory purposes of the Water Conservation Act of 2009 (SB 7x 7 of 2009) (the "Act").

Section 10608.48(b) of the Water Code, part of the Act, requires measurement of the volume of water delivered to customers at the farm gate. The legislation built on, and explicitly cross-referenced, existing statutory requirements (AB 1404 of 2007, Water Code § 531.10(a)) relating to the measurement of water delivered to agricultural customers. Section 531.10(a) requires agricultural water suppliers to report farm-gate water delivery data, and section 531.10(b) exempts suppliers from having to comply with this and other requirements of AB 1404 if the programs or practices are not locally cost effective. Indeed, in its recent guidelines on implementation of section 531.10(a), the Department explicitly recognized that in order to comply with section 531.10(a), an affected supplier must "measure farm-gate deliveries."²

¹ Our prior comment letters, dated September 6, 2011 (joint comments), June 14, 2011, and May 17, 2011 are incorporated by reference. Because the draft permanent regulation is substantially the same as the emergency regulation, our prior comments on the emergency regulation are applicable to this regulation as well.

² These guidelines were circulated by the Department on November 10, 2010, and are available online at: http://www.water.ca.gov/calendar/materials/ab_1404_package_10096.pdf. The quotation is from page 2 of the Guidelines (page 12 of 15 of the PDF).

However, as noted in our prior comment letters, the proposed regulation allows measurement upstream of the farm gate if the supplier lacks legal access to the farm gate (§ 597.3(b)(1)(A)) or if the supplier cannot measure deliveries with a single measurement device “comparable in cost to other measurement devices commonly in use” (§ 597.3(b)(1)(B)). These exceptions are overbroad and are inconsistent with the mandate of the Water Conservation Act of 2009. We have repeatedly provided alternative language for these regulatory sections that are consistent with the requirements of the statute.

These exceptions have the potential to exempt a significant proportion of the water suppliers covered by the statute from measurement at the farm gate. For instance, the Department’s economic analysis estimates that, “half of the potentially affected irrigated acreage in the Sacramento Valley region would be measured at the lateral level.”³ That economic analysis further assumes that all other suppliers would measure at the turnout,⁴ but this assumption is arbitrary in light of the breadth of these two exceptions and the failure to consider whether other suppliers would utilize these exceptions. Thus it is likely that an ever greater proportion of affected water deliveries will not be measured at the farm gate.

Regarding the specific paragraphs containing language changes in the September 22 draft of the proposed regulation, we offer the following comments:

Section 597.1(i) We support the deletion of this paragraph. As written, the deleted language would have provided a broad exemption for large water suppliers that are contractors for Central Valley Project water from the water measurement requirements of the Act. This is not consistent with the requirements of the Act. The Act explicitly includes an exemption that states that CVP contractors do not need to prepare agricultural water management plans, however, no such similar exemption exists from the measurement and volumetric pricing provisions of section 10608.48(b).

Section 597.3(b)(1)(A) While the language proposed to be stricken appears to be merely redundant, the remaining language continues to be flawed. Some water suppliers may have never needed legal access to the farm gate in the past, but are authorized by law to acquire such access. This exception is overbroad and is inconsistent with the intent and requirements of the Act, and the language should be revised to provide a more narrowly drawn exception that is consistent with the intent of the law. We recommend that the language be amended to read: “The agricultural water supplier does not have, and lacks the legal authority to obtain, legal access . . . “

Section 597.3(b)(1)(B) Similarly, the language proposed to be stricken appears redundant, but the remaining language provides an impermissibly broad exemption from measurement at the farm gate. The language of the Act does not support an exemption that turns on whether a measurement device is not simply “commercially available”, but “comparable in cost to other

³ Department of Water Resources, Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement, April 22, 2011, at page 10.

⁴ *See id.* (“It is assumed for purposes of this analysis that suppliers in other regions use only turnout-level measurement.”)

measurement devices” as well. Even if the cost of commercially available devices were a permissible consideration under the statute, the lack of guidance on making cost comparisons between measurement devices renders the provision unworkable.

We believe that a more narrowly drawn exemption, coupled with a reporting requirement that would document the specific field conditions where measurement accuracy could not be achieved with commercially available measurement devices, would strike the appropriate balance. We recommend that the language be amended to read:

“The agricultural water supplier has determined that the applicable accuracy standard of 597.3(a) cannot be met with commercially available measurement devices, where the agricultural water supplier provides documentation of the flow rates, elevations, and operating conditions that make it impossible to measure volume at each customer delivery point for which the measurement exemption is claimed, and these data and the finding have been reviewed, signed and stamped by a registered Professional Engineer.”

Section 597.3(b)(2) We have no objection to this change.

Section 597.3(b)(2)(A) We have no objection to this change, although as noted above, we believe that section 597.3(b)(1)(A) should be limited to water suppliers that lack the legal authority to obtain sufficient access to customer delivery points.

Section 597.3(b)(2)(B) We have no objection to this change, although as noted above, we believe that section 597.3(b)(1)(B) should not be based upon the lack of availability a single measurement device (as contrasted with two devices, for high and low flows respectively) nor be based upon an vaguely stated standard of cost comparability.

Section 597.4(e)(4) The Act requires that water suppliers “shall implement” the critical efficient management practices (volumetric pricing and water measurement) on or before July 31, 2012. Cal. Water Code § 10608.48(a). However, this section of the regulation provides a limited exception that allows certain water suppliers to avoid implementing the accuracy standards for water measurement by this statutory deadline. This exception applies only for agricultural water suppliers that are “unable to bring [an existing water measurement device] into compliance,” allowing them until 2015 to comply. It appears unclear what “unable to bring into compliance” means under the regulation (presumably this would not include cost-effectiveness, given the statutory scheme and structure of cost-effectiveness exceptions), and the December 2012 date appears inconsistent with the statutory requirement (as may this entire section). This section provides the only guidance on the implementation timing, and because the regulation provides this timing provision for existing devices, under accepted principles of regulatory and statutory construction the reasonable inference from the regulatory scheme is that all new devices must be installed and certified by the statutory deadline.

Nevertheless, NRDC recognizes that fully complying with new measurement requirements will take time, and at several stages in the stakeholder process we have noted that the lack of clarity on the timing of implementing the measurement standard has created unnecessary uncertainty for agricultural water suppliers and frustrated attempts at consensus on the language of the rule. The

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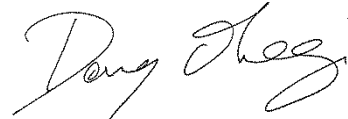
lack of guidance on the time available for completion has hardened the demands of the regulated community for the regulation to require as little change as possible from the status quo. It was clear from the outset of the stakeholder process in the summer of 2010 that full implementation of farm gate measurement for some districts would require a multiyear process at best, and with significant issues pending in a protracted rulemaking, little time would be left to fully "implement" the required measures before the date of July 31, 2012 contained in the act. Unfortunately, the Department has failed to provide much guidance to water suppliers as to the deadlines for implementation, and we believe the Department has missed an opportunity to reach consensus on stronger regulations that more fully comply with the Act's requirements while also providing a more realistic schedule for full implementation.

Thank you for your attention to these views.

Sincerely,



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Senior Policy Analyst



Doug Obegi
Staff Attorney